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September 2, 1999

Magalie Roman Salas, Esq.
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, SW - Room A325
Washington, DC 20556

Re: CC Docket No. 96-45, DA No. 99-1535

Dear Ms. Salas:

Herewith transmittal, on behalf of United States Cellular Corporation, are an original and six copies of its "Comments" on the "Petition for Preemption" filed by Western Wireless Corporation in the above-referenced proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Sincerely,

Peter M. Connolly

Attachment

cc: Sheryl Todd
ITS (w/diskette)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	CC Docket No. 96-45
	)	
WESTERN WIRELESS	)	
CORPORATION	)	
	)	DA No. 99-1535
Petition for Preemption	)	
Of the Order The	)	
South Dakota Public	)	
Utilities Commission	)	

COMMENTS OF UNITED STATES CELLULAR CORPORATION

Peter M. Connolly
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Attorneys for United States
Cellular Corporation

September 2, 1999

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Summary

The FCC should pre-empt the Order of the South Dakota Public Utilities Commission ("SDPUC Order") denying Eligible Telecommunications Carrier ("ETC") status to a subsidiary of Western Wireless.

The SDPUC erred in holding that for designation as an ETC a carrier must already be providing services eligible for universal services support throughout the service area. It is illogical and contrary to the plain language of Section 214(e) of the Act to hold that carriers must provide such services before they know if they will be eligible for the subsidies that will make the services possible. To sustain the SDPUC Order would also be unjust to the consumers of South Dakota and similarly situated states who will suffer from an absence of competition in the provision of supported services.

Also, the SDPUC was wrong in holding that "gaps" in coverage may preclude ETC designation, since all carriers have such "gaps" and high cost support is essential to providing universal service for both wireline and wireless carriers.

The FCC should also seize this opportunity to provide guidance to the states and to carriers concerning how wireless carriers are to be assimilated into the structure of the high cost program.

At present, we still do not know, for example, what the relevant geographic areas for high cost support will be, or how the FCC will administer its "hold harmless" formula in relation to wireless carriers.

The FCC should determine how support will be administered when wireline and wireless carriers serve the same customers and should make clear that wireless carriers may receive high cost support for their existing mobile service.

The need for FCC guidance has, if anything, been increased by the recent opinion of the U.S. Court of Appeals for the Fifth Circuit in the Texas Office of Public Counsel case, which leaves ambiguous the type of additional ETC eligibility requirements which may be imposed by the states.

In conclusion, it is urgent that the FCC now deal with the issue of fairness to wireless carriers in the universal service context, or else the system will be unworkable and consumers will not receive the benefits of competition.

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COMMENTS OF UNITED STATES CELLULAR CORPORATION

United States Cellular Corporation ("USCC") hereby files its Comments on the Petition for Preemption (the "Petition") filed by Western Wireless Corporation ("Western Wireless"). USCC owns and/or operates cellular systems in over 140 markets. It has sought and received Eligible Telecommunications Carrier ("ETC") status in the State of Washington[1] and plans to seek ETC status in other states. Accordingly, USCC has a considerable interest in how the FCC resolves a petition bearing on the issue of state standards for designating ETCs.

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[1] Yelm Telephone Company, et al, Docket No. UT-970333 (Washington Utilities and Transportation Commission)

I. Western Wireless Has Demonstrated A Need For Preemption

In its Petition, Western Wireless makes a very strong case that the decision of the South Dakota Public Utilities Commission ("SDPUC") to deny ETC status to one of its subsidiaries[2] does not comply with Section 214(e) of the Communications Act[3] and thus should be pre-empted under Section 253 of the Act.[4]

As Western Wireless argues, the SDPUC Order disregards a central mandate of Section 214(e) of the Communications Act, which is that for all service areas other than rural areas state public utilities commissions must designate all qualified carriers as ETCs.

The relevant holding of the SDPUC Order is that to qualify for designation as an ETC a carrier:

> "must be actually offering or providing the services supported by the federal universal services support mechanisms throughout the service area"

SDPUC Order, Conclusions of Law, ¶6. If sustained by the FCC, this conclusion will tend to preclude any carrier other than an ILEC

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[2] Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, TC98-146 (released May 19, 1999) ("SDPUC Order").

[3] 47 U.S.C. § 214(e).

[4] 47 U.S.C. § 253.

from being designated as ETC in South Dakota as it would require a prospective new entrant to offer a package of services comparable to those of the incumbent LEC before it can be considered for ETC status and thus qualify for subsidies comparable to those already received by the ILEC.

If other state commissions were to follow South Dakota, it might mean that new entrants' facilities would have to be constructed and service would have to be offered, often at a considerable financial loss, in the hope that ETC status would be granted at the whim of the relevant state commission. It is difficult to imagine a more formidable barrier to the provision of supported services than that. No rational carrier would proceed on such a basis.

If the position of the SDPUC is sustained by the FCC and adopted by other states, it will mean that wireless carriers will be essentially barred from the provision of supported services, to the great detriment of consumers in all affected states, who would benefit from competition for their business. The FCC's essential premise in virtually all its current regulatory endeavors is that consumers benefit from competition among carriers. The SDPUC Order is profoundly anti-competitive because it freezes the status quo indefinitely.

Western Wireless's persuasive counter-argument against the SDPUC, set forth at pages 12-16 of its Petition, and supported by the cases cited therein, is that state commissions should designate ETCs based on a carrier's commitment to provide supported services in the future as well as its present service. We urge its careful consideration and adoption by the FCC and would only add and emphasize the following.

The relevant provision of the Communications Act, Section 214(e)(1)[5] does not, by its plain language, support the position of the SDPUC. It reads, in pertinent part, as follows:

> "A common carrier designated as an eligible telecommunications carrier under paragraphs (2), (3) or (6) shall be eligible to receive universal service support in accordance with Section 254 and shall throughout the service area for which the designation is received -- (A) offer the services that are supported by Federal universal service mechanisms under Section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services ... and (B) advertise the availability of such services and the charges therefor using media of general distribution."

It would be illogical for the actual current provision of supported services to be a pre-requisite to ETC designation because for carriers not now receiving subsidies, such as CMRS carriers, it is the receipt of ETC designation, with the subsidies which flow

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[5] 47 U.S.C. § 214(e)(1).

from that designation, which will make possible the provision of supported services at the rates which can be advertised to the public. To argue that CMRS carriers must already be providing such services before designation puts the cart, namely service, before the horse, designation. ILECs may support such a reading because they currently receive the subsidies which support their prices. However, it is profoundly unfair to any carrier other than an ILEC and it is impossible to believe Congress intended it in a statute otherwise dedicated to competition.

Section 214(e)(1)'s discussion concerning carrier eligibility for ETC status refers to Section 254(b) of the Act, which, in turn, refers only to universal service "principles." Under Section 214(e)(1), once carriers are "designated" in accordance with those principles, they "shall" offer supported services and advertise them. But again, the statute would not contemplate carriers' offering or advertising services at supported rates unless carriers were certain of their eligibility to receive support. Thus, the correct reading of Section 214 (e)(1) is obviously that of Western Wireless and other wireless carriers.

USCC would also note one additional unreasonable and discriminatory holding of the SDPUC. Though it is not entirely clear, the SDPUC Order appears to hold that a CMRS carrier cannot

be designated as an ETC if it has any "gaps" in its coverage.[6] This principle, if applied uniformly, would preclude all carriers, including ILECs, from ETC designation, for no carriers provide service to all potential customers in their service areas. ILECs need present "high cost" subsidies to serve many of the customers they serve. Wireless carriers may also require subsidies to serve certain customers living in certain areas they would not be able to serve but for those subsidies. And to rule that wireless carriers cannot be designated as ETCs because they do not already serve such customers is again illogical and unfair.

To require that a carrier must, in essence, provide universal service before finding a carrier eligible for the subsidies which will enable that carrier to provide such service reverses the statute's essential structure.

In the face of a state commission ruling which turns on its head a fundamental requirement of the 1996 Telecommunications Act, it is the FCC's clear duty, under both Section 253 of the Act[7] and the general principle that the FCC may act to pre-empt a state

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[6] SDPUC Order, Findings of Fact ¶¶ 12,20,22,26.

[7] 47 U.S.C. § 253 (d) ("If ... the Commission determines that a state or local government has permitted or imposed any statute, regulation on local requirement that violates subsection (a) or (b), the Commission shall pre-empt ... to extent necessary the correct such violation or inconsistency.")

commission action if it would "thwart" or "impede" federal policy[8] to pre-empt the SDPUC Order, as requested by Western Wireless.

II. The FCC Should Use This Opportunity To Provide Guidance To The States On Designating Wireless Carriers as ETCs

While it is vital that the FCC pre-empt the SDPUC Order, it is equally important that the Commission seize the opportunity provided by the Petition to provide guidance to the states and to telecommunications carriers concerning how a universal service system which includes wireless carriers will be structured.

In a sense, the SDPUC Order is explicable as the result, in part, of the FCC's previous unwillingness to spell out how the radically dissimilar wireline and wireless industries will be melded into one for the purpose of providing supported high cost services.

As USCC has pointed out in "Reply Comments" filed in Docket 96-45 on August 6, 1999 it would be difficult to discern from the previous orders in this docket that wireless carriers even exist, much less that they comprise a huge and growing proportion of the

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[8] Louisiana Public Service Commission v. FCC, 476 U.S. 355, 376 (n.6) (1986).

nation's telecommunications infrastructure and can be a vital resource in serving unserved and underserved areas.

Four months away from the FCC's January 2000 deadline for the implementation of its new "high cost" universal service structure, we still do not know, for example, what the relevant geographic areas for high cost support will be, or how wireless service areas will be made to fit into those units. The FCC has not discussed its "hold harmless" formula in relation to (previously unsubsidized) wireless carriers. Also, for wireline carriers and interexchange carriers, high cost support must be slotted into a complex, interlocking structure of existing payments, such as "Subscriber Line Charges," "Carrier Common Line Charges," and "Pre-Subscribed Interexchange Carrier Charges." Wireless carriers neither pay nor receive such charges. A universal support structure which is related to those payments will make no sense from a wireless perspective, except by happenstance.

The FCC must cease ignoring the basic question of whether wireless and wireline carriers may both receive support for the different "lines" they may provide to the same "high cost" customers and if not, the FCC must develop criteria for determining which carrier is to receive support.

ILECs and CLECs do not serve the same customers. For them competition is a zero sum game. Hence it is sensible to provide that each should receive support for the customers they serve. But wireless carriers serve many customers who also may be the customers of ILECs or CLECs. And while wireless carriers believe that some of their customers, in high cost areas and elsewhere, are dropping their wireline service in favor of wireless service only, they have, at present no way of knowing this for certain with respect to any customer.

Finally, it is also essential that the FCC deal with an issue left ambiguous by Western Wireless's Petition. The FCC should clarify that wireless carriers may obtain ETC status for the mobile service they currently provide and do not have to provide a specifically tailored version of "wireless local loop" ("WLL") service to be designated as ETCs.[9] The services eligible by federal universal support mechanisms under Section 54.101(a) of the FCC's rules may be provided by cellular and PCS carriers providing

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[9] Western Wireless evidently sought designation as an ETC in South Dakota for a prospective WLL service. Many wireless carriers, including USCC, if they receive high cost support, might offer service plans which could lead to widespread use of wireless service a substitute for wireline service. However, such service offerings, which could be construed as "WLL" service, would not necessarily require any specific technical changes in the operation of wireless systems. The FCC should not require any specific technical configuration before such service has had a chance to develop.

their present wireless services and a WLL service configuration should not be necessary to be designated as an ETC.[10]

And if anything, the task of clarification has become even more urgent since the U.S. Court of Appeals for the Fifth Circuit issued its opinion in Texas Office of Public Counsel v. FCC (No. 97-60421).

In that case, one of the court's holdings was that the states could, under certain circumstances, add to the list of ETC eligibility requirements in Section 254(b) of the Act.

However, that holding was qualified by a crucial footnote which set limits on the states' discretion in specifying additional eligibility requirements for ETCs:

> "To be sure, if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of Section 214(e)(2)'s mandate to "designate" a carrier or "designate more than one carrier."

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[10] The services and functionalities specified in Section 54.101 (a) are described from the perspective of wireline telephone companies. However, there is no reason why they cannot also be provided by CMRS licensees offering mobile service or why that section could not be slightly modified, as in the case of Section 54.101(a)(6) (E-911 access), to take into account the current evolving status of wireless technology.

Texas Office of Public Utility Counsel v. FCC, slip opinion, footnote 31.

Assuming that the Fifth Circuit's holding concerning additional qualification for ETCs is upheld on appeal[11] the FCC should nonetheless provide that any such additional state qualifications must not undermine the central objective of Section 214(e), which is the creation of a fair, competitively neutral universal service system through the designation of multiple, competitive ETCs.

And if such a system is to be created, it will have to be one in which support flows to the carrier best able to serve customers at the lowest cost, whether the technology used by the carrier is wireless or wireline in nature. And, in order to achieve that goal, the FCC must focus on the basic differences between LECs and wireless companies and design a system which is fair to both types of carriers.

USCC's preliminary proposals for such a system, which echo those of Western Wireless and other wireless carriers, include the

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[11] USCC believes that the FCC was correct in its argument that the states cannot impose additional non-statutory eligibility requirements on ETCs and will prevail on rehearing or in the Supreme Court.

use of geographically disaggregated areas such as "wire centers" as the most competitively neutral geographic unit for designating ETCs, a relatively high percentage cost "benchmark" which eligible carriers would have to meet, and the early abolition of carrier-specific "hold harmless" payment formulas. Those proposals were set forth in greater detail in our comments in this docket and we will not repeat them here.

What is essential is that the FCC understand that the SDPUC Order is a symptom of the potential regulatory chaos which lies ahead if the Commission does nothing to address the problem of wireless assimilation into the universal service structure.

In dealing with this Petition in the larger context of the universal service proceeding, the Commission must come to grips with the wireless problem, or else risk the creation of a universal service structure which will ignore the unique characteristics of CMRS carriers and thus be unworkable.

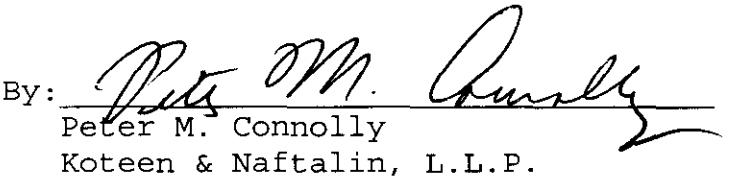
Further, unless the SDPUC Order is pre-empted, it will result in injustice to the people of South Dakota and other states whose commissions adopt similar orders as they will be denied the benefits of competition in the provision of supported services.

CONCLUSION

For the foregoing reasons, the FCC should pre-empt the SDPUC Order, and provide guidelines under which wireless carriers can be designated as ETCs.

Respectfully submitted

UNITED STATES CELLULAR CORPORATION

By: 

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September 2, 1999

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